United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

76-1034

B P/S

To be argued by
LEON DICKER

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HARRY D. IACONETTI,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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QUESTIONS PRESENTED

1. Whether the rebuttal testimony of Messrs. Goldman and Stern, partner of the Government's chief witness and attorney for the Government's chief witness, respectively, was properly admissible and not violative of the Federal Rules of Evidence.

2. Whether the introduction into evidence of the recordings and transcripts thereof, made February 11, 1975 and February 24, 1975, respectively, violated defendant's constitutional rights.

3. Whether the Court's charge to the jury, including Counts 3 and 5 (Title 18, Section 1951, U. S. C.), which Counts were dismissed after the verdict, improperly influenced the jury's determinations on all five Counts, and violated defendant's due process rights.

4. Whether defendant's guilt on the bribery charges was proven beyond a reasonable doubt.

UN TED STATES COURT OF APPEALS

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Docket No. 76-1034

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v -

HARRY D. IACONETTI,

Defendant-Appellant.

- - - - - - - - - - - - - - - - - - -

APPELLANT'S BRIEF

Preliminary Statement

Defendant, a federal employee--a quality assurance specialist employed by the General Services Administration--was arrested on February 24, 1975 and charged with bribery and extortion. He was released on his own recognizance that day, without bail.

On April 8, 1975, a five count indictment was returned

against defendant.

In brief summary, the first two counts deal with a firm known as Champion Envelope Manufacturing Company. It was alleged that (1) defendant, "did . . . solicit" money and (2) that he "did accept and receive . . . approximately $3,000" to be influenced in the performance of his official acts. These counts were grounded upon Title 18, Section 201 (c) U. S. C.

The third count, bottomed on Title 18, Section 1951 U. S. C., charged defendant with attempted extortion.

Counts 4 and 5 set forth similar activities with reference to a company known as Lightalarms Electronics Corporation--Count 4 based upon bribery without a specific sum and Count 5 grounded in extortion* (A-5-8).

All of the counts arose out of alleged transactions between defendant and the aforesaid companies--with Champion in February, 1975 and with Lightalarms in October, 1974.

Trial began before Judge Jack B. Weinstein on October 10, 1975 and was concluded on October 21, 1975.

Prior to submitting the case to the jury, the Court denied defendant's motion to compel the Government to elect whether to proceed on Counts 1, 2 and 4 or on 3 and 5, respectively.

*References preceded by "A" refer to the Appendix; "R" to the transcript of the trial.

Defendant claimed that bribery and extortion were mutually exclusive.

On October 21, 1975, the jury rendered verdicts of guilty on all five counts. On January 7, 1976, Judge Jack B. Weinstein sentenced defendant to a term of four years of imprisonment on Counts 1, 2 and 4, each to run concurrently. Counts 3 and 5, upon defendant's renewed motion, were dismissed. (A-129)

Simultaneously, defendant's motion for a new trial on the grounds that certain evidence was improperly admitted in violation of the hearsay rule and for lack of evidence was likewise denied by the Trial Court. (A-130-145)

STATEMENT OF FACTS

The Government's Case

The Government's direct case on Counts 1, 2 and 3 was based mainly on the testimony of Michael Lioi and Zenon Babiuk with the questioned rebuttal testimony of Alan Goldman and Morris Stern.

Mr. Lou Sonner supported Counts 4 and 5. Several exhibits were introduced into evidence and the direction taken by the Government was to establish, in broad terms, the development and implementation of the alleged bribery and extortion acts

by defendant.

A. The Bribery

Two officers of Champion Envelope initially testified: Michael Lioi and Zenon Babiuk. The testimony of the latter did not include any direct threat for, request, demand or necessity of payment for defendant. It merely attempted to show that defendant was not properly performing his duties.

Lioi's testimony--in direct conflict with that of the defendant asserted demands for bribes on February 10, 1975 (no recording thereof exists), with a reiteration therefor on February 11, 1975--in Lioi's office with Lioi's own transcribing equipment. Thereafter, further conversations--on FBI equipment were recorded between Lioi and defendant on February 24, 1975.

All of said conversations culminated in Mr. Lioi's allegedly placing a package containing $3,000 in the trunk of defendant's car, in front of Lioi's business premises on February 24, 1975. Defendant was thereupon arrested by an FBI officer observing the scene.

Mr. Lou Sonner's testimony, hazy and uncertain of the alleged demands in October 1974, was based upon said defendant's threats to disapprove his company's government contracts unless

certain payments were made.

The Government also called a witness from the General Services Administration--not in defendant's department. Said witness indicated that defendant, a quality assurance specialist, investigating potential government contractors, had the final approval or disapproval of the issuance of a contract and the acceptance of the products produced pursuant to the contract. Defendant's witness--also from the General Services Administration--indicated to the contrary.

Defendant took the stand, denied the criminal assertions made by the Government's witnesses. He claimed that he was merely play acting with Lioi because Lioi had initially offered him a bribe on February 10, 1975, the date no recording was made.

Defendant further testified that he did not need funds and was therefore not prone to accepting bribes or extorting money. Also, that his finances were in good order and that his record of service with the government was excellent.

By virtue of the direct contradictions between the Government's chief witnesses and the defendant, the Trial Court permitted the Government to call in its rebuttal case Go[illegible]an, a business partner of Lioi, and Stern, the attorney for Lioi's company.

The testimony of these two witnesses was admitted into evidence over the strenuous objections of defendant.

The testimony of the two rebuttal witnesses was offered to show that Lioi had expressed to them on February 10, 1975, the defendant's alleged demands. It is this latter testimony which defendant alleges is hearsay and inadmissible under the Federal Rules of Evidence.

Defendant's defense was based upon his repeated denials of any breach of his official duties, his desire to perform his responsibilities efficiently and assist government contractors, his effort to gather evidence re Lioi's proffered bribe, pursuant to an unofficial conversation among federal employees in his department.

ARGUMENT

POINT ONE

THE TESTIMONY OF MESSRS. GOLDMAN AND STERN WAS ERRONEOUSLY ADMITTED INTO EVIDENCE, THE SAME BEING HEARSAY

The testimony of Stern and Goldman detailed conversations each had with the Government's chief witness, Lioi.

It covered Lioi's out of court declarations--which allegedly repeated defendant's demands and statements of February 10, 1975. This testimony was offered for the truth of the matter asserted therein and, in fact, constitutes hearsay under Rules 801, et seq, Federal Rules of Evidence.

The basic definition of hearsay under Rule 801 (c) notes that it "is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Despite defendant's strenuous objection, the Trial Court held that these statements were not hearsay under Rule 801 (d) (1) (B) and Rule 801 (d) (2) (C). Further, that even if the statements were in fact inadmissible hearsay, they were admissible under Rule 803 (24).

The Trial Court held the statements to be probative and relevant. It is not denied that they were offered for the truth of the matters asserted therein.

An examination of the aforesaid Rules reveals their inapplicability to this case and that such testimony is hearsay and inadmissible under Rule 802.

It is also to be noted that the preamble to the Federal

Rules of Evidence states, in pertinent part, that the new Rules effective July 1, 1975, should not be applied to work "injustice." Clearly, these innovative changes, as used by the Trial Court--especially Rule 803 (24), worked an injustice upon defendant.

At the very end of the trial, the admission of this rebuttal testimony clearly surprised defendant. Unfortunately, there is a paucity of case law interpreting these sections. It can hardly be said that defendant was not surprised and had adequate notice to prepare therefor despite the Trial Court's early remarks relative thereto (A-28-30).

A. The Court's statements initially alluding thereto were prejudicial to defendant.

As set forth in the Appendix, pp 28-30, the Trial Court initially raised the matter of rebuttal evidence, without any suggestion or demand from the Government. Despite the vast contradictions between the testimony of the two Champion officers--Lioi and Babiuk--and defendant, this constituted prejudicial error.

B. The Court's order permitting the same was error and prejudicial to defendant.

Lioi testified at the trial and was subject to cross-examination concerning the February 10, 1975 meeting with defendant. The testimony of Goldman and Stern as to Lioi's prior statements

was consistent with Lioi's testimony at the trial. However, Lioi's prior statements were not offered to rebut a charge of recent fabrication and improper influence or motive.

In United States v. Potash, 118 F. 2d 54, 57, it was held that the mere fact that defendant's counsel had cast aspersions upon the accuracy of the witnesses' memory and veracity of his testimony did not amount to attack based on recent fabrication. Thus, the Court held that a written statement offered by the Government had been properly excluded as there was no charge of recent fabrication.

Here, there was no attempt to impeach Lioi by offering Lioi's own inconsistent statements as to the February 10th meeting or showing he had a bad reputation. In fact, defendant introduced no evidence of Lioi's hostility or bias. The precondition of impeachment was not met by the Government and the exception to the hearsay rule does not apply.

Further, despite the fact that defendant's testimony alleged a different version of what was said between them on February 10, defendant never directly claimed that Lioi had changed his testimony.

It must be noted that what constitutes an attack based on recent fabrication has been judicially considered.

In United States v. Zito, 467 F. 2d 1401, the defense counsel's persistent inquiries during cross-examination reflected an intensive interest in the witness' prior crimes, suggesting to the jury that his testimony was a fabrication for the purpose of obtaining clemency. No such inquiries or suggestions were present here.

Further, the mere fact that defendant's testimony is in conflict with that of the Government's key witness is not per se a charge of recent fabrication. It cannot be asserted that a mere denial by a defendant of his guilt or that he uttered certain words, constitutes an attack based upon recent fabrication.

In United States v. Dorfman, 70 F. 2d 246, this Court held that prior consistent statements must be made prior to the events upon which the alleged improper motive was based.

An examination of defendant's testimony--as to his conversation with Lioi on February 10--reveals that it was Lioi who offered defendant money. Any motive Lioi had to lie or fabricate a story necessarily arose at the time of that conversation. Lioi's statements to Goldman and Stern were made after this conversation.

Even under Rule 801 (d) (2) (C) the rebuttal testimony is not admissible as non-hearsay.

The Trial Court impliedly found that defendant, requesting

a bribe from Lioi, authorized him to act as his agent. Thus, Lioi's statements are admissible against defendant as vicarious admissions.

Clearly, this portion of the Rule does not apply to the relationship between an alleged criminal and his agent as it was never intended to cover a "criminal agency" situation. It is hornbook law that cases dealing with statements made by agents and vicarious admissions deal mainly with commercial agencies. An "agent" who aids a criminal in furthering the crime is truly a co-conspirator.

Rule 801 (d) (2) (E) was specifically designed to cover a co-conspirator situation only. The Government has consistently contended that Lioi was acting on its behalf only. Since he is clearly not a co-conspirator, he does not fall within the framework of the Rule.

The Trial Court's Memorandum (A-130) predicates the admission of the rebuttal testimony on relevancy, exceptions to the hearsay rule and as "reliable and necessary hearsay."

The rebuttal evidence may be relevant but its unfair prejudice to defendant cannot be discounted. The Trial Court has permitted rank hearsay to sail under the guise of relevancy. Its unfairness and inequity greatly outweighs the rule of relevancy.

Anything may be relevant, but that does not make it proper. Here, the protection of defendant's rights is paramount.

Consultations between business partners go on at night as well as during the day and there is no testimony that Goldman could not have been present that day.

Further, the Trial Court found defendant had actually requested a bribe (A-139) and thus authorized Lioi to confer with his partners (A-139). Thus, pursuant to Rule 104 (a), the Trial Court acted as a trier of fact.

This "guilty" finding cannot establish the requisite agency under Rule 801 (d) (2) (C). It destroys the presumption of innocence and actually usurps the jury's power. Also, the Rule (104(a)) should not be so construed in a jury trial.

To contend that defendant made Lioi his agent stretches the understanding of the term. Assuming arguendo, that there was an agency, Lioi was not authorized to make the statements. Lioi conferred with Goldman and Stern on his own initiative.

Nor is the rebuttal testimony admissible as an exception to the hearsay rule under Rule 803 (24).

Clearly, this statutory exception does not afford unlimited use. In any event, it must be carefully restricted in criminal cases.

In United States v. Demasi, 445 F. 2d 251, this Court held that the statements involved were classic examples of inadmissible hearsay. Lioi's statements to his partner and his attorney are in the same form and likewise inadmissible.

This Court held that the statements were erroneously admitted but they were not prejudicial error. The basis for that finding was obviously based upon a statement referring to an unidentified man or men. However, here the hearsay statements specifically charged defendant and were used to buttress the testimony of the Government's key witness. Thus, the use of Goldman and Stern's testimony was highly prejudicial to defendant.

In United States v. Bennett, 409 F. 2d 888, this Court's dictum noted that a certain letter, which had been introduced into evidence, subject to limiting instructions, was properly inadmissible hearsay. This Court also held that"we have criticized the excessive use of hearsay."

Finally, although the Trial Court's memorandum notes that defendant did receive timely notice, Rule 803(24) was clearly violated because timely notice was not received. Therefore, the testimony may not be admitted under this exception because the proponent had not made it known to defendant sufficiently in advance of the trial or hearing to provide defendant with a fair opportunity to meet it. Further, not only is the intention to offer the testimony necessary, but the particulars of it and the names

and addresses are to be made known.

An examination of the advisory notes concerning this rule, reveals that its inclusion was grounded on the safety factor of the notice provision which should be strictly construed.

Defendant was not advised of the Government's intention to introduce the testimony of these men until October 17--, a Friday-only two days before the same was offered on Monday, October 20.

The Rule further provides that any hearsay admitted must have "circumstantial guaranties of trustworthiness." Here, the statements do not offer requisite guaranties of trustworthiness.

Lastly, the Rule provides that the Court must determine that the interests of justice will best be served by the introduction of the statement into evidence. In preserving the interests of justice, the rights of defendant may not be lightly discarded. Defendant's rights were severely prejudiced by the introduction of the hearsay statements.

In United States v. Nill, 518 F. 2d 793, the Court noted that evidentiary questions of materiality, relevancy and competency are for the Trial Court "in the exercise of sound discretion." It was held that nothing but an abuse of that discretion, fraught with reasonable likelihood or prejudice will ordinarily warrant appellate interference."

That there has been an abuse of discretion here, permitting the testimony of Goldman and Stern to be offered by the Government in rebuttal, is clear.

See also United States v. Kills Crow, 527 F. 2d 158.

Nor can it be claimed that the evidence adduced by the testimony of Goldman and Stern was irrelevant. It was vital to the Government's case and necessary to bolster its chief witness.

In United States v. Kelly, 526 F. 2d 615, the Court of Appeals for the Eighth Circuit affirmed a conviction of the defendants for aiding and abetting the armed robbery of a federal bank. Here, testimony of an accomplice relative to statements made by defendants was properly admissible.

This case of the admissibility of hearsay evidence, grounded upon an accomplice's testimony, is not similar to our appeal.

The Eighth Circuit Court, however, determined that the statement, "although damaging was not crucial or devastating" to defendant's case, and that "the statement was not essential to the Government (and) it did not serve to make an otherwise weak case strong."

In the appeal now being considered, the testimony of Goldman and Stern is "crucial, devastating" and essential. Their rebuttal evidence was a necessary element to the Government's case.

In United States v. Coppola, 526 F. 2d 764, a criminal conviction was affirmed. The Court admitted the hearsay statements within the parties' admissions exceptions under the co-conspirator aspect.

None of said factors are present in the instant case against defendant.

The rebuttal evidence was erroneously admitted and violated defendant's rights.

POINT TWO

THE ADMISSION INTO EVIDENCE OF THE TWO TAPED CONVERSATIONS--FEBRUARY 10, 1975 AND FEBRUARY 24, 1975-AND THE TRANSCRIPTS THEREOF VIOLATED THE DEFENDANT'S RIGHTS

Prior to trial, defendant's motion to suppress this taped evidence was denied and was continually denied at the trial each time it was renewed.

The tape of February 11, 1975 was recorded by Lioi on his own recording device and is of a conversation between himself and defendant. The tapes of February 24, 1975 were conversations between Lioi and defendant made on an FBI recording device secreted on Lioi.

The use of this electronic eavesdropping and the subsequent use of the evidence obtained therefrom was prejudicial to defendant.

An examination of two pertinent cases in the Supreme Court of the United States warrants attention herein.

In On Lee v. United States, 343 U. S. 747, an agent of the Government had actually transmitted two conversations he had with the defendant to other Government agents. It was held that the Government agent had not committed a trespass in the tort sense and that the other Government agents could testify to

what was heard. The Court did not address itself to the issue of consent and this case turned solely on the issue of trespass.

In Katz v. United States, 389 U. S. 347, Government agents, without defendant's consent overheard and recorded his end of a conversation by attaching a listening device to the outside of a telephone booth. Here, the trespass theory enunciated in On Lee, supra, was discarded. However, the Court noted that, regardless of the presence or the absence of the tort feature, the Government's activities in electronically listening and recording defendant's words violated his rights.

The denial of defendant's motion to exclude the tapes was reversible error (A-37-39). A motion, if involving constitutional rights of a defendant, is never made "much too late."

Here, Lioi used his own tape recorder and adroitly taped the conversation of February 11, 1975 and not the conversation of February 10 where defendant claimed Lioi had offered him a bribe. Defendant is a person aggrieved thereby, and the failure to suppress the tapes and transcripts was highly prejudicial to his rights.

POINT THREE

THE COURT'S CHARGE TO THE JURY, INCLUDING THE THREE BRIBERY COUNTS AND TWO EXTORTION COUNTS WAS PREJUDICIAL TO DEFENDANT.

When the Trial Court charged the jury as to the crimes of bribery and extortion together (A-81-102), it constituted prejudicial harm to defendant. Such harm was demonstrated when the Court dismissed the extortion charges after the jury's verdict.

Even the Court, throughout the entire trial, was troubled by the relationship between bribery and extortion counts as charged. (A-103). Since the crimes of bribery and extortion involved only slight differentiating factors, the charging of essentially the same crimes to the jury was both confusing and misleading.

Clearly, if the jury found the defendant guilty on the bribery counts, it had no true alternative but to find him guilty on the extortion charges. It is impossible to determine which counts the jury considered initially. Whichever counts were first considered, there was little choice but to find subsequent guilty verdicts. Clearly, if the extortion counts, (3 and 5), were dismissed initially, the possibility looms that there may have been no bribery convictions of defendant.

Thus, by permitting the trial to proceed on both the bribery and extortion counts, the Trial Court committed prejudicial error. This error is substantially harmful and prejudicial and necessitates a reversal of the conviction on the bribery counts.

POINT FOUR

THE GOVERNMENT DID NOT PROVE DEFENDANT'S GUILT UNDER TITLE 18, SECTION 201 (c), U. S. C., BEYOND A REASONABLE DOUBT.

Bribery of public officials and witnesses is a federal crime. It is set forth in Title 18, Section 201, U. S. C..

Subsection (c) thereof provides:

> "Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for:
>
> (1) being influenced in his performance of any official act; or
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
> (3) being induced to do or omit to do any act in violation of his official duty; or"

As heretofore set forth, defendant was charged with soliciting and accepting a bribe from Champion Envelope and soliciting a bribe from Lightalarms Electronics.

A. Solicitation of a bribe from Champion Envelope Company and the acceptance thereof was not proven beyond a reasonable doubt.

The testimony of Ralph DiGiacomo (A-40) admits that defendant's report was only one of three vital factors in determining the granting of the contract-"a financial report (and) compliance with the equal opportunity law" are also necessary and of "equal importance."

It also demonstrated that on February 11, 1975, defendant had already approved and signed the plant facility report of Champion Envelope (A-41) and that his function was completed (A-42).

Therefore, Lioi had no valid basis to believe that defendant had any power over his Company.

Babiuk's testimony admits defendant "never asked (him)" for money, defendant never threatened him or ever said his company would not get the contract (A-53). This witness for the Government even admitted that defendant--on February 10, 1975, told him "everything looks all right" (A-54).

Lioi's testimony is punctuated by one glaring falsehood relative to the tapes. He states he did play them for his "two associates"--Babiuk and Goldman(A-64). Goldman--a rebuttal witness--denied hearing the tapes (A-21).

Further, Lioi also testified that defendant only did one other pre-award survey for Champion (A-57) and defendant noted that he had previously done two. While Lioi pretended not to know defendant, it was clear that they were acquainted.

The conversation of Lioi with defendant after February 10, 1975--when he knew the pre-award survey would be favorable--indicates that Lioi and defendant were actually"play-acting." Further, Lioi constantly stated that he knew his Company could perform under any Government contract.

Lioi admitted that on February 10, 1975, the recording device was on his "desk", but "it was not in the 'on' position." (A-66).

Finally, Lioi testified (A-58) that he "dropped the envelope containing the $3,000 into the trunk" and defendant "closed the lid." It is admitted that immediately prior thereto Lioi received a government form from defendant that the Company needed.

Lioi's testimony was the Government's high water mark. Yet it is directly contradicted by defendant.

Note must be made of Pionzio's testimony (A-67-69). He stated that there were three vital ingredients for granting the Champion contract and that defendant does have a minor role therein--

a pre-award survey only, which can be overruled." (A-69)

B. Solicitation of a bribe from Lightalarms Electronics was not proven beyond a reasonable doubt.

Sonner proferred a telex from his supplier but did not truly connect defendant to the necessity therefor. He testified as to defendant's alleged solicitation but admits that he did not immediately report the same (A-45).

He also admitted that he reported defendant to Kraft(A-46) whom he suspected of being a "higher-up" only after Kraft appeared at his plant (A-49).

Finally, he admitted (A-52) that defendant never threatened him with "loss of that contract . . . unless Sonner gave him money."

C. Defendant's testimony negates any crime.

Defendant's denials, explanations, statements and financial status reveal that the statutory requirements of Title 18, Section 201 (c), U. S. C. have not been met.

The verdicts on Counts 1, 2 and 4 have not been proven beyond a reasonable doubt and should be overturned. The evidence is insufficient to support the same.

CONCLUSION

FOR ALL THE ABOVE REASONS, IT IS RESPECTFULLY SUBMITTED THAT DEFENDANT IACONETTI'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

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Attorney for Defendant-
Appellant

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DEAN MILLER, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2 CHARLTON ST NEW YORK, N.Y. 10014.

That on the 19th day of MARCH, 1976 deponent personally served the within APPELLANT'S BRIEF upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing~~ true copies of same ~~enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

DAVID G. TRAGER, ESQ.
UNITED STATES ATTORNEY-EASTERN DISTRICT OF NEW YORK
ATTORNEY FOR PLAINTIFF-APPELLEE
UNITED STATES COURTHOUSE
225 CADMAN PLAZA EAST
BROOKLYN, N.Y.

Dean Miller

Sworn to before me this
19th day of March, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

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